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I
Introduction

Producers and promoters of sports and entertainment events who desire to utilize the services of foreign performers often encounter a variety of complex and sometimes contradictory rules and regulations enforced by the United States Immigration & Naturalization Service (INS) and the Internal Revenue Service (IRS). The purpose of this article is to explain and compare some of the provisions of the respective United States immigration and tax laws, insofar as they relate to foreign entertainers or athletes, and to examine the interrelationship of the administrative rules and procedures of the INS and the IRS. Part II of this article discusses the variety of visas available for the foreign sports or entertainment figure desiring entry for work purposes. These visas range from the non-immigrant standard visitor visa and temporary work permit to the immigrant visa for permanent residency based upon that individual's profession. Parts III and IV examine the tax treatment of foreign entertainers and the IRS reporting requirements for foreign entertainers.

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II
Visas

Immigration law involves a complex interplay of federal agencies: the Departments of Justice, State and Labor. First, the Immigration and Naturalization Service (INS), a branch of the Justice Department, administers and enforces the immigration laws; an immigration petition, for example, must be approved by the INS, acting for the Attorney General.[1] Second, visas to enter the United States are generally obtained through the State Department's American consulates abroad. The decision whether to issue a visa is within the exercise of the consulate's discretion, and there is virtually no appeal from their denial.[2] Third, the Labor Department determines who is eligible to work in the United States by its labor certification.[3]

Under the Immigration and Nationality Act of 1952 (the Act), entertainers include sports figures, rock groups, film stars and theatrical performers. In addition to these obvious examples, entertainers cover a myriad of occupations from hairdressers, milliners, make-up artists and cameramen to professional golfers[4] and female professional wrestlers.[5] As is the case with any person seeking entry into the United States, entertainers may obtain visas as non-immigrants or as immigrants.

A. Non-immigrant Visas

Persons who wish to come to the United States temporarily must obtain non-immigrant visas.[6] There are thirteen categories of non-immigrant visas; for entertainers, the B-1 business visa,[7] the H-1 and H-2 temporary worker visas[8] and the L visa[9] are relevant. The Immigration and Nationality Act establishes a presumption that all applicants desire permanent residence so the applicants have the burden to demonstrate that they

1. 8 U.S.C. § 1103(b) (1976); see also 8 C.F.R. § 2.1 (1982). Gomez v. Kissinger, 534 F.2d 518, 519 (2d Cir. 1976).

2. *See* 3 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE 19-47 (1979) [hereinafter cited as GORDON & ROSENFIELD].

3. *See infra* notes 39-40, 50 and 64 and accompanying text.

4. *In re* Masters, 13 I. & N. Dec. 125 (1969).

5. *In re* Pacheco, 11 I. & N. Dec. 427 (1965).

6. Immigration and Nationality Act § 101(a)(15) [hereinafter cited as INA], 8 U.S.C. § 1101(a)(15) (1976); 8 C.F.R. § 214.1-214.4 (1982).

7. INA § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B) (1976).

8. INA § 101(a)(15)(H), 8 U.S.C. § 1101(a)(15)(H) (1976).

9. INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L) (1976).

will stay temporarily and that they have no intention of abandoning their permanent residence abroad.[10]

1. *Business Visa*

A temporary visitor for business may be granted a B-1 visa.[11] Any person seeking to enter the United States merely to negotiate a contract, take orders for his business, render services, deliver a speech or attend a board of directors meeting, may obtain a B-1 visitor visa as long as he works for and receives a salary from a foreign employer. The holder of a B-1 visa may not earn money in the United States from a United States source.[12] This requirement ensures that the business visitor does not adversely affect the American work force. The initial admission can be up to one year with extensions available for up to six months, by filing Form I-539, Application to Extend Time of Temporary Stay.[13]

Although the B-1 visa is referred to in the federal regulations as a visa for business[14] visitors, the term "business" has never been defined in the enabling statutes. The State Department defines business as the "legitimate activities of a commercial or professional character, not including purely local employment or labor for hire."[15] The Board of Immigration Appeals (BIA), the agency that adjudicates appeals from immigration proceedings, has defined the proper holder of a B-1 visa as "an alien, other than an entertainer by profession, coming to perform services who would be classifiable as an alien of distinguished merit and ability, but who will receive no salary or other remuneration from a United States source, other than expenses."[16] It is unclear whether entertainers such as per-

10. INA § 214(b), 8 U.S.C. § 1184(b) (1976); 8 C.F.R. § 214 (1982); *see* 5 GORDON & ROSENFIELD, *supra* note 2, at chapter 25.

11. INA § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15), states as follows:
The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens— . . . (B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure.

12. 1 GORDON & ROSENFIELD, *supra* note 2, at 2-66.

13. 8 C.F.R. § 299.1 (1982).

14. 22 C.F.R. § 41.25(b) (1978).

15. 22 C.F.R. § 41.25(b) (1982).

16. *In re* Essex Cryogenics, 14 I. & N. Dec. 196 (1972).

sons coming to the United States to make a film come under this category; ultimately, the consulate decides whether to permit entry.[17]

The INS has increasingly refused to allow entertainers to perform in the United States on the strength of a B-1 visa. The agency insists that entertainer visa petitions be initiated in the United States and be filed by the prospective employer,[18] such as the concert promoter, tour promoter, producer, agent or studio. INS approval of the petition is often based on consultation with applicable government agencies.[19] The petition is submitted on Form I-129B, Petition to Classify Nonimmigrants as Temporary Worker or Trainee, in duplicate and under oath, with a $10.00 fee to the District Director[20] who has jurisdiction over the place or one of the places where the performance is to occur. The INS will notify the petitioner on Form I-171C, Notice of Approval of Nonimmigrant Visa Petition whenever a visa petition or application for extension of temporary stay filed on Form I-129B is approved, and the approving officer must promptly forward the copy of Form I-171C to an appropriate officer of th IRS.[21] Thus, the IRS is put on notice by Form I-171C that the foreign worker will be employed in the United States.[22]

Managers, trainers, musical accompanists and other persons determined by the District Director to be necessary for successful performance by the beneficiary of an approved H-1 petition[23] may also be accorded H-1 classification if included in the same or separate petition. Should the entertainer subsequently wish to perform on other tours for a different United States employer, a new petition on Form 129B must be submitted and approved.

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17. 3 GORDON & ROSENFIELD, *supra* note 2, at 19-47.

18. The petitioner need not be a United States resident. 8 C.F.R. § 214.2(h)(1) (1979).

19. INA § 214(c), 8 U.S.C. § 1184(c) (1976). Practically speaking, the only appropriate agency consulted is the United States Department of Labor. *See* 1 GORDON & ROSENFIELD, *supra* note 2, at 2-111.

20. 8 C.F.R. §§ 214.2(h)(1), 299.1 (1982).

21. *See* 8 C.F.R. § 214.2(h) (1 app.) for appropriate address of Internal Revenue Service which corresponds to the location of the petitioning employer.

22. *See infra* notes 66-71 and accompanying text.

23. *See infra* notes 44-47 and accompanying text.

2. *Class H Visas*

The 1952 Immigration Act establishes a category of visas for foreign nationals coming to the United States temporarily to engage in employment.[24] The Act, as amended, confers temporary work status, or "H status," on three classes of individuals:

H-1: Persons of distinguished merit and ability;
H-2: Other temporary workers coming to perform services for which qualified American workers are not available;
H-3: Alien trainees.[25]

In addition, a special category was established for the spouses and minor children of aliens qualifying in any of the H categories. Spouses and minor children are classified H-4 if they are accompanying or following to join the qualifying alien. They will not, however, be permitted to work; if they wish to work, separate petitions must be filed.[26] To qualify in any of these categories, the alien must have a foreign residence which he has no intention of abandoning.

(a) *H-1 Visa*

The employer who wishes to hire the alien must file the H-1 visa petition on Form I-129B, Petition to Classify Nonimmigrant as Temporary Worker or Trainee, with the INS office located where the services are to be performed.[27] Prior to April

24. *See* INA § 101(a)(15)(H), 8 U.S.C. § 1101(a)(15)(H) (1976).

25. *Id.* The section states as follows:

> [A]n alien having a residence in a foreign country which he has no intention of abandoning (i) who is of *distinguished merit and ability* and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability, and who, in the case of a graduate of a medical school coming to the United States to perform services as a member of the medical profession, is coming pursuant to an invitation from a public or nonprofit private educational or research institution or agency in the United States to teach or conduct research, or both, at or for such institution or agency; or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or (iii) who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him.

Id. (emphasis added). H-3 visas will not be discussed because entertainers generally do not qualify as aliens entering the United States for the purpose of receiving training.

26. 1A GORDON & ROSENFIELD, *supra* note 2, at 3-22-3-23.

27. 1 GORDON & ROSENFIELD, *supra* note 2, at 2-115, 2-120, 2-121.

1970, the law required that the work to be undertaken by an H-1 applicant had to be temporary, but the temporary requirement has now been deleted. An alien can now assume temporarily an employment position of a permanent nature. The H-1 holder's intention must still be to remain in the United States temporarily, and he must maintain his foreign residence without any intention of abandoning it.[28]

To accommodate the touring entertainer, the INS allows the tour organizer to the petitioner. Thus, every person who has contracted for performance need not apply. The petition may be filed in the location of any one of the performances.[29]

The petitioner must show that the alien "is a person of distinguished merit and ability . . . who is coming to the United States to perform services of an exceptional nature requiring such merit and ability."[30] This category is thus most frequently used by foreign sports figures and entertainers who enter the United States to work for only a temporary period. The H-1 visa is particularly suited to the needs of entertainers because labor certification from the Department of Labor is not required. Hence, a shortage of American workers need not be shown.

The term "distinguished merit and ability" is not defined in the statute or the regulations. The House Committee Report on the 1970 Amendments to the Act expressed satisfaction with judicial and administrative interpretations of these terms and also declared that this term "implies a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person so described is prominent or has a high level of education in his field of endeavor."[31] Evidence of such qualifications, which should be attached to the petition, include "documentation, certification, affidavits, degrees, diplomas, writings, reviews and any other evidence attesting to . . . distinguished merit and ability and that the . . . services . . . require a person of such merit and ability."[32] Section 214.2(h)(2)(ii) of the Code of Federal Regulations further detail the content for school records, and employer or expert affidavits, and requires disclosure of the source of the affiant's

28. *In re* Gutierrez, 15 I. & N. Dec. 727 (1976).
29. 1A GORDON & ROSENFIELD, *supra* note 2, at 3-24.
30. INA § 101(a)(15)(H)(i), 8 U.S.C. § 1101(a)(15)(H)(i) (1976).
31. H. REP. No. 91-851, 91st Cong., 2d Sess 4 (1970).
32. *See* 8 C.F.R. § 214.2(h)(2)(i) (1978).

knowledge.[33]

For professional entertainers, the professional organization in the United States representing such entertainers may be consulted unless the entertainer is one known to be of distinguished merit and ability. In one particular case,[34] Anthony Newley was held to be an internationally known stage and film actor, having starred in a very successful Broadway show and appeared in over 40 films. The Immigration Service found that an advisory opinion from any professional organization was unnecessary.

Case law has shown that aliens of "distinguished merit and ability" must in the records be clearly outstanding in their specialty. In another case,[35] the beneficiary entertainer, Sandy Shaw, a very popular singer in England at that time applied for an H-1 visa to perform on an American television program. Although two of her recordings had been top hits in England for differing periods of time, they had not been in the "Top 10" of the record charts in the United States. The District Director denied her H-1 visa application where newspaper clippings had indicated that she had few recording successes, and because the proposed remuneration of $750 would have been insufficient for a performer of the caliber contemplated by the statutes.

Many factors are considered by the INS in determining whether the entertainer meets the requirements necessary to be considered an individual of distinguished merit and ability. Section 214.2(h)(2)(ii)[36] gives explicit rules for entertainers. The factors to be considered by the INS include the following:

1. Whether the beneficiary will perform and has performed as a star or featured entertainer, as shown by playbills, reviews, advertisements, publicity releases, averments by the petitioner and contracts;
2. The entertainer's acclaim as per newspapers, magazines and trade journals;
3. The reputation of places where the entertainer has appeared or plans to appear;
4. The reputation of repertory companies, ballet groups, orchestras or productions in which he has performed;

33. *Id.* at 214.2(h)(2)(ii) (1982).

34. *In re* Peak Productions, 11 I. & N. Dec. 462 (1965).

35. *In re* Shaw, 11 I. & N. Dec. 277 (1965).

36. See 8 C.F.R. § 214.2(h)(2)(ii) (1978). Evidentiary requirements are set forth in 8 C.F.R. § 214.2(h)(2)(i) (1978).

5. The extent of past commercial successes, based on published box office gross sales or record sales;
6. Past and present salaries per performance, as indicated by employment contracts;
7. National, international or other significant awards;
8. Advisory opinions by unions, organizations and recognized critics or experts in his field;
9. Prior issuance of H-1 visas.[37]

One particularly troublesome problem facing many foreign entertainers and sports figures is time pressure. Often the alien's presence will be required at a United States location on extremely short notice. Another reason for time pressure is that contracts for entertainers may not be finalized until the last possible moment. Because the H-1 visa requires a contract of employment, filing may not be accomplished until the contract is finalized. "For these reasons, the practitioner should have all of the forms and supporting documentation ready to file in advance of the final signing of contracts so that no time is wasted in obtaining the visa."[38]

In cities where H-1 petitions for entertainers are numerous, such as Los Angeles and New York, INS officials are often familiar with these problems. In many situations these officials, upon proper request, will expedite the adjudication process so that American audiences will not be deprived of the opportunity to see or hear the entertainer.

Persons accompanying the entertainer, such as managers, trainers or musical accompanists, may be included in the same or separate petitions to be classified as H-1 aliens.[39] "Copies of contracts between the petitioner and beneficiary must also be attached to the petition."[40] Among the factors considered by the INS are special technical skills and foreign language ability which only they can provide. Because it is very difficult for these individuals to gain H-1 status, it is imperative that these individuals have strong data supporting the petition.

Finally, H-1 visas for persons of distinguished merit and ability are usually issued for an initial one year period. The H-1 visa may be renewed upon filing of Form I-539, Application to

37. *Id.*

38. NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE 3-2 (2d student ed. 1981) [hereinafter cited as NLG].

39. 1 GORDON & ROSENFIELD, *supra* note 2, at 2-112.

40. *Id.* See 8 C.F.R. 214.2(h)(2)(i) and (2) (1982).

Extend Time of Temporary Stay.[41]

(b) *H-2 Visas*

For entertainers and sports figures who do not meet the strict requirements of the H-1 classification, the H-2 visa for ordinary workers is a possible way to obtain legal clearance to work temporarily in the United States. To qualify an alien for H-2 status, the employer must obtain a temporary labor certification from the Department of Labor. "Unlike labor certification for immigrants, which is a decisive prerequisite when applicable . . . the labor certification for H-2 nonimmigrants is advisory only, since the law reposes in the Attorney General complete authority."[42] The Department of Labor reviews the application to insure "that the employer has made every reasonable effort to hire a qualified, willing, and able United States worker, and that the wage the employer offers is commensurate with the prevailing wage for similar employment in the immediate geographic area."[43] If the Department of Labor denies the application, the practitioner should contact the Department to determine what further documentation should be submitted for approval.[44]

This process is far more time consuming than that involved in applying for the H-1 visa, and special treatment to expedite the petition in emergency situations is rarely, if ever, available. As a matter of practice, an H-2 visa for an entertainer is generally difficult to obtain. Approval of petitions is granted for "a specified activity, area, and employer." A new petition is required for additional engagements.[45] Such a petition may be successful where the alien will be utilized to train other people to enable them to perform functions as permanent employees, and the duty of the trainer will be required only for a specific period. It is interesting to note that a regulation which is particularly applicable to sports and entertainment figures provides that an approved petition will be automatically suspended during a strike or labor dispute.[46] The purpose of this regulation is to prevent employers from using foreign ath-

41. 1 GORDON & ROSENFIELD, *supra* note 2, at 2-120; 8 C.F.R. § 299.1.

42. 1 GORDON & ROSENFIELD, *supra* note 2, at 2-114; INA § 101(a)(15)(H), 8 U.S.C. § 1101(a)(15)(H) (1976); 8 C.F.R. § 214.2(h)(3) (1982).

43. 8 C.F.R. § 214.2(h)(3)(i) (1978); *see* NLG, *supra* note 38, at 3-25.

44. NLG, *supra* note 38, at 3-25.

45. 1 GORDON & ROSENFIELD, *supra* note 2, at 2-115.

46. 8 C.F.R. § 214.2(h)(10) (1978).

letes as strike breakers.[47] However, in cases where a dramatic role may require an authentic accent or a certain "look" or specific training, the H-2 visa may be obtained. Such instances would require that the script be submitted as proof of the special restrictions of the part.

After the employer obtains the temporary labor certification, the employer should submit Form I-129B, Petition to Classify Nonimmigrant as Temporary Worker or Trainee, and the labor certification to the INS. The employer must demonstrate that he intends to hire the alien and that the position is temporary, that is, the position will terminate by the time the alien worker leaves. The H-2 visa is valid for a one year period and is renewable up to three years.[48]

(c) *Class L Visas*

The performer who has multiple talents, such as actor/director or singer/composer, could be eligible for an L-1 visa as well as or instead of an H-1 visa. The L-1 visa, like the H-1 visa, does not require labor certification. In 1970, Congress added the class L-1 visa[49] nonimmigrant category. The L-1 temporary visa is granted to persons in managerial or executive capacities or in capacities involving specialized knowledge, who immediately preceding the time of application for admission into the United States have been employed for one full year by a firm, corporation or other legal entity. The alien seeks transfer into the United States temporarily in order to continue rendering his services to the same employer or subsidiary or affiliate thereof.[50] The intra-company transferee is designated as an L-

47. *See* Status of Non-Immigrant Alien Soccer Players during strike in a North American Soccer League, 56 INTERPRETER RELEASES, April 30, 1979, app. I at 3.

48. 1 GORDON & ROSENFIELD, *supra* note 2, at 2-120; *see* 8 C.F.R. § 214.2(h)(1) (1982).

49. INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L) (West Supp. 1982), as amended by section 1(b). INS regulations at 8 C.F.R. § 214.2(1); State Department regulations at 22 C.F.R. § 41.67 (1982).

50. INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L) (West Supp. 1982), states as follows:

> [A]n alien who, immediately preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him.

1 transferee and his spouse and minor children are entitled to enter the United States as L-2 transferees.

The prospective American employer would generally act as the party who petitions the INS to approve the foreign worker's eligibility for the visa. A corporation which is a subsidiary or is affiliated to a foreign corporation who has employed the entertainer could be formed in the United States and could petition for the transfer of the entertainer based upon his non-performing skills. For example, if Sir Lawrence Olivier had been employed by an English company for a continuous period of twelve months in England, that company could form a wholly owned U.S. subsidiary company. The U.S. corporation could then petition to hire out Olivier's services on the basis of his expertise as a dramatic coach to an American university, for example, or similarly could utilize his abilities as a director to a film being shot in the U.S. by one of the major studios. It is important to stress that the entertainer's capacity in the foreign organization must be managerial, executive or involve specialized knowledge and the latter requirement would most certainly be true in our example.

The statute is couched in general terms leaving wide room for interpretation. The L-1 category is not intended to benefit alien investors, entrepreneurs or self-employed persons. However, the statute does refer to the employer as a "firm, corporation or other legal entity." Because a corporation has a separate legal identity, its sole stockholder may qualify for L-1 status,[51] and an executive or manager of a corporation can qualify as an employee even if he is one of the owners or its sole owner. Thus, in the preceding example, Sir Lawrence could own 100% of the stock of the English company and the American company could still be eligible for the visa.

The non-immigrant classification for L-1 transferees and for H-1 workers is not necessarily mutually exclusive and it may be possible for some aliens to qualify under *either* provision. An alien who has *not* been employed by the petitioning company for one year in the requisite capacity may qualify for H-1 non-immigrant status. Similarly, the L-1 intra-company transferee is not barred from seeking adjustment of status to a permanent resident, if he thereafter decides to remain in the

51. *In re* Aphrodite Investments, 17 I. & N. Dec. 530 (1980).

United States permanently.[52]

B. Permanent Resident Applications by Entertainers—Immigrant Status

For an entertainer to obtain permanent residence in the United States, he must fall within one of the six categories of "preferences."[53] A fixed percentage of visas are allocated to each preference. The quota of visas is currently 270,000 worldwide and 20,000 per country except colonies.[54] Five of the seven preferences are based on a familial relationship between an alien and a United States citizen or permanent resident. The remaining two categories, the third and sixth preferences, are based upon employment offered to the alien. In the majority of such cases, the alien must obtain a certification from the Department of Labor. The Secretary of Labor must certify that:

(1) there is a shortage of workers to perform such labor;
(2) the employment of the alien will not adversely affect wages and working conditions.[55]

The labor certification must be submitted with the petition.

Some persons, however, may qualify for automatic labor certification if their occupations are listed in Schedule A.[56] Schedule A contains four groups. Groups II and IV apply to foreign entertainers. Group II includes:

> aliens (except aliens in the performing arts) of exceptional ability in the sciences or arts including college and university

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52. A person in the United States in an irregular or a temporary status may apply to change to a status of a lawful permanent resident if (1) the alien maks an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed. INA § 245(a), 8 U.S.C. § 1255(a); *see* GORDON & ROSENFIELD, *supra* note 2 at 7-71 to 7-89.

53. INA § 202(e), 8 U.S.C. § 1152(e) (1976). If the alien has an immediate family relationship with a United States citizen or lawful permanent resident, he may acquire permanent residency (provided he is not excludable under INA § 212, 8 U.S.C. § 1182 (1976)) and may avoid the preference system. INA §§ 201, 202, 204-206, 221-224; 8 U.S.C. §§ 1151, 1152, 1154-1156, 1201-1204 (1976); 8 C.F.R. §§ 204.1-204.2 (1982).

54. INA § 202(a), 8 U.S.C. § 1152(a) (1976).

55. 1A GORDON & ROSENFIELD, *supra* note 2, at 3-58; *see* INA § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1976), as amended by section 10, Act of October 3, 1965, Pub. L. No. 89-236, § 10, 79 Stat. 917 (1965); *see* Busbee, *Immigration and the Department of Labor*, 43 INT'L REL. 133 (1966); THE LABOR CERTIFICATION, REPORT OF SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION 67-77 (1968).

56. Under 20 C.F.R. § 656.10 (1982), the Administrator of the United States Employment Service has determined that there are insufficient workers able, willing, qualified and available for the occupations listed under schedule A.

> teachers of exceptional ability who have been practicing their science or art during the year prior to application and who intend to practice the same science or art in the United States.[57]

For the purposes of this group, the term "science or art" means any field of knowledge and/or skill with respect to which colleges and universities commonly offer specialized courses leading to a degree in the knowledge and/or skill. An alien need not, however, have studied at a college or university in order to qualify for the Group II occupation. The exclusion of "performing artists" from Schedule A Group II can create great difficulties for the foreign performer who intends to emigrate. Nevertheless, many foreign entertainers often have artistic ability in other than the performing arts, and thus a job offer may be based on that ability. For example, a singer/songwriter might be listed solely as a songwriter for immigration purposes. Similarly, an actor may be offered a job as a drama teacher for the same reasons. It is therefore often possible for a well known entertainer to obtain permanent residence though it may be based on some other facet of his artistic purposes for immigration purposes. In comparison, Group IV of Schedule A covers the following:

> (1) Aliens who *have been* admitted to the United States in order to work in, and who are currently working in managerial or executive positions with the same international corporation or organization with which they were continuously employed as managers or executives outside the United States for one year before they were admitted; and
> (2) Aliens outside the United States who will be engaged in the United States in managerial or executive positions with the same international corporation or organization with which they have been continuously employed as managers or executives outside the United States for the immediately prior year.[58]

Thus, a nonimmigrant who has obtained an L-1 visa would be able to acquire permanent residence under Schedule A, Group IV, without labor certification.

Group IV was recently amended to add further requirements to discourage abuse by "investors" setting up branches in the United States with the sole intent to emigrate. The amendment requires that the international corporation have been "doing business" in the United States for at least one year

57. 20 C.F.R. § 656.10 (1982).
58. *Id.* at § 656.10(d) (emphasis added).

prior to application for permanent residency under Group IV. The mere presence of an office is not enough—there must be a regular systematic course of business such as rendering services, providing goods and soliciting business.[59] If the alien's occupation is not included in Schedule A, then Forms ETA 750A and B, Employment and Training Administration, and other documents showing facts which entitle the alien to Schedule A status should be submitted with the petition.[60]

1. *Third Preference*

The alien or another person on the alien's behalf may file Form I-140, Petition to Classify Preference Status of Alien on Basis of Profession or Occupation,[61] to petition for third preference. Aliens who qualify for third preference are "members of the professions, or who because of exceptional ability in the science, or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States, and whose services are sought by an employer in the United States."[62] Visa numbers for third preference cannot exceed ten percent of the total limitations, or 27,000 each fiscal year.[63] Unlike the preferences based upon immediate family relationships, the ceiling for third preference is fixed, and this category does not inherit visa numbers unused by the other priority groups.[64]

The term "exceptional ability" as used in the statute contemplates a much more stringent standard than "distinguished merit and ability."[65] In one case, a court defined "exceptional ability" as "some rare or unusual talent, or unique or extraordinary ability in a calling which, of itself, requires talent or skill."[66] While the statute does not define arts and sciences, these terms should be evaluated in the light of common understanding.[67]

Art always relates to something to be done, science to some-

59. NLG, *supra* note 38, at 4-37.
60. NLG, *supra* note 38, at 4-47.
61. 8 C.F.R. § 299.1 (1982).
62. INA § 203(a)(3), 8 U.S.C. § 1153(a)(3) (1976).
63. 1 GORDON & ROSENFIELD, *supra* note 2, at 2-197-2-198.
64. *Id.* at 2-198.
65. 1A GORDON & ROSENFIELD, *supra* note 2, at 3-22; Lee v. INS, 407 F.2d 1110 (9th Cir. 1969).
66. *In re* Kim, 12 I. & N. Dec. 758, 761 (1967).
67. *In re* Tagawa, 13 I. & N. Dec. 13 (1967).

> thing to be known. Art in the higher sense transcends all rules. Science does not, like mechanic arts, make production its direct aim, yet its possible productive application is a constant stimulus to scientific investigation. Creative art, seeking beauty for its own sake, is closely akin to pure science, seeking knowledge for its own sake. Whereas an engineer, a lawyer, a physician or teacher, having attained his education might reasonably be expected to successfully practice his profession, such is not the case in the arts. In the arts, success or recognition comes to the individual solely through his creative ability.[68]

"Exceptional ability" must be supported by documentary evidence. The evidence may attest to the universal acclaim and national or international recognition given to the alien. Other factors supporting the claim of exceptional ability include receipt of a nationally or internationally recognized prize or award, competition for excellence for a specific product or performance, or for other outstanding achievements.[69]

On the other hand, it has been known as a practical matter that sports figures almost always need to submit labor certifications to emigrate to the United States. Although some sports figures such as professional golfers are considered entertainers and may be included within the arts for "exceptional ability,"[70] other sports figures usually do not so qualify. The regulations limit the term "science or art" to fields of study which lead to a degree. Because colleges and universities normally do not award degrees in a specific sport such as basketball or golf, exceptional ability in sports is not sufficient to be exempt from labor certification. Thus, the process involved in obtaining a third preference immigrant visa for a foreign athlete may be quite time-consuming and frustrating.

2. *Sixth Preference*

Aliens who do not meet the standards prescribed for immigrant status under the third preference may be eligible under the sixth preference.[71] In fact, it may be advisable to apply

68. *Id.* at 14.

69. 8 C.F.R. § 204.2(g) (1979).

70. *In re* Masters, 13 I. & N. Dec. 125, 126 (1969).

71. 1A GORDON & ROSENFIELD, *supra* note 2, at 3-22. *See infra* notes 56-63 and accompanying text; *see also In re* Bocris, 13 I & N Dec. 601 (1970). The fact that the transferee is the beneficiary of any approved third or sixth preference petition, or is registered for immigration with an American Consul, does not preclude approval of his L-1 status or extention of his temporary stay. However, filing a preference petition or

under both preference categories, thereby increasing the opportunity for becoming eligible to emigrate more quickly.[72] The sixth preference comprises ten percent, or 27,000, of visa numbers.[73] To qualify under the sixth preference, the alien must be "capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a *shortage* of employable and willing persons exists in the United States."[74] The alien's prospective employer must file the sixth preference petition.[75] Labor certification is required even though the requirement of a shortage of American workers seems to make it superfluous. As a practical matter, the sixth preference is a catch-all category for those aliens who do not qualify under the third preference. Typical sixth preference occupations are tailors, cooks, home attendants, managers, administrators, craftsmen, teachers and agricultural workers.[76] Like the third preference, the sixth preference has a fixed ceiling and does not inherit visa numbers unused by other priority groups.[77]

For years, a substantial quota backlog in the availability of visa numbers under the sixth preference category has existed. A petitioner acquires a priority date based on the date of filing of the visa petition. The visa bulletin[78] indicates the time remaining until the quota becomes current. For example, the January 1983 visa bulletin showed a cutoff date for sixth preference on a world wide basis as June 15, 1980.[79] This figure means that persons who filed visa petitions or labor certifications after June 15, 1980 are not eligible to immigrate. In comparison, the cutoff date for third preference on a worldwide basis is October 15, 1982. It is therefore more advantageous to qualify under the third preference.

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obtaining a labor certification may generate inquiry concerning the temporary nature of his job assignment and of his intended stay in the United States. *See supra* notes 56-63 and accompanying text; *see also In re* Bocris, 13 I. & N. Dec. 601 (1970).

72. 8 C.F.R. § 204.1(c)(3) (1979).

73. 1 GORDON & ROSENFIELD, *supra* note 2, at 2-209.

74. INA § 203(a)(6), 8 U.S.C. § 1153(a)(6) (1976) (emphasis added).

75. 1A GORDON & ROSENFIELD, *supra* note 2, at 3-24.

76. *Id.* at 3-27.

77. 1 GORDON & ROSENFIELD, *supra* note 2, at 2-210.

78. United States Department of State, Bureau of Consular Affairs, Visa Office, Washington, D.C. Number 33, Volume V, Immigrant Numbers for February 1983.

79. *Id.*

III
Relationship Between the INS and the IRS

There are various procedures whereby the respective agencies of the Immigration and Naturalization Service and the Internal Revenue Service cooperate and exchange information regarding nonresident aliens.[80] Special attention has been given to foreign entertainers and athletes because of their high profile and the concern of the IRS regarding possible United States tax avoidance by foreign entertainers. One cooperative procedure involves the forwarding of copies by the INS to the IRS of certain notices of approval of non-immigrant visa petitions (INS Form I-171C).[81]

The IRS manual furnished to service employees states that H-1 Visas are the only type of leads in the nonresident alien program that INS furnishes to IRS.

> H-1 visas are usually granted to aliens of distinguished merit and ability to perform services of an exceptional nature. It is normally this type of visa that is granted to nonresident alien entertainers, sports figures, and other nonresidents who are self-employed. Frequently these aliens travel throughout the United States giving performances, demonstrations, speeches, etc. in numerous cities.[82]

The IRS manual further distinguishes between visas issued to entertainers who are employees and those issued to entertainers or other persons who will be self-employed. The manual suggests that where the INS file indicates that an entertainer is self-employed, and is to appear at a promotional event, the IRS agent should contact the promoter of the event to insure that there are adequate arrangements to withhold required taxes and that these arrangements pertain to all appearances in the U.S.[83]

It is the express policy of the service to disregard any application for a reduced rate or exemption from withholding tax

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80. *See* IRS Manual Supplement 42 D-342 and 46 G-15 with regard to inter-agency compliance effort on apprehended illegal aliens.

81. The INS sends copies for those cases that meet certain criteria as set forth in the INS policy manual, LEM V INS. 5(13)52.1 (May 7, 1981). To achieve greater compliance among nonresident aliens, INS sends a copy of certain Notices of Approval of Nonimmigrant Visa Petitions (INS Form 1-171C) to the IRS. Rather than send a copy of this form on all aliens who are issued H-1 visas, the INS has agreed to send a copy of Form 1-171C only on cases that meet the dollar criterion in LEM V INS.

82. *See* IRS Manual V(13) 52-1 ¶ 4 (May 7, 1981).

83. *See* IRS Manual V(13) 52-4 ¶ 1 (Dec. 3, 1982).

which may be available under a tax treaty (this is usually made by filing Form 1001). The Service recommends that "the alien and/or withholding agent should be advised that Form 1001 is not applicable in the case of compensation paid for the services of alien performers, and withholding at the rate of 30% of gross income is required.[84]

If the INS file indicates that the entertainer will be employed by a foreign corporation, this information will be made available to the IRS which will contact the local promoter of the event to insure that withholding is made at the 30% rate. The IRS manual recommends that the local promoter be held liable as the withholding agent, and that if the withholding agent refuses to withhold there should be an assessment made against the entertainer by terminating his tax year.[85]

If on review of the INS file it appears that an entertainer is performing in several locations coming within the jurisdiction of more than one IRS district office, then the investigating employee is directed to notify other districts as soon as possible. This notification may take the form of memorandum advising the other tax district of the entertainers name, date and place of appearance, and the name and address of the promoter together with a list of dates and places of all of the appearances in the United States. If the withholding of taxes is not made at one event, the list may be used by the IRS to follow up at a promotion in another district. Thus, for example, on a concert tour by a rock group, the INS file would contain a list of concert dates which would be forwarded to the local IRS office and in turn forwarded to other district offices throughout the country to insure appropriate withholding of taxes is made.

IV
Tax Treatment of Foreign Entertainers

Under the United States tax laws, the tax treatment of foreign entertainers will depend upon whether the entertainers are "resident aliens" or "non-resident aliens." Although there is a relationship between immigration status and resident or non-resident status for tax purposes, the immigration laws differ from the tax laws in the criteria used to define residence; therefore, one must not assume that because a foreign enter-

84. *See* IRS Manual V(13) 52-4, ¶ 8 (Dec. 3, 1982).
85. *See* IRS Manual V(13) 52-4, ¶ 9 (May 7, 1981).

tainer entered the United States on a non-immigrant Visa that the IRS will consider the entertainer to be a non-resident for tax purposes.[86] In addition, it should be noted that tax treaties between the United States and other countries may contain definitions of residence which will be controlling and will override the above principles when making the determination of whether an entertainer is a resident for United States tax purposes. For example, where an individual has strong ties in both countries, the United States-United Kingdom tax treaty provides that he shall be a resident where his personal and economic relations are closest or if this cannot be determined, where he has "an habitual abode."[87] The treaty further provides that if "habitual abode" cannot be determined, residence will be the individual's country of nationality.

A. Residence

The Immigration and Nationality Act of 1952 defines residence to mean "the place of general abode; the place of general abode of the person means his principal actual dwelling place in fact, without regard to intent."[88] As a practical matter, the issue of residence or non-residence for immigration purposes, will always be a predetermined matter of fact insofar as it will be necessary to establish residence outside the United States as a prerequisite to the issuance of all classifications of non-immigrant visas.

There are however no such clear cut classifications when determining residence for tax purposes. The term "residence" is not specifically defined in the Internal Revenue Code itself, but the regulations provide the following explanation of the various factors which may constitute residence:

> An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for the purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be

86. *See infra* Section III(B).
87. *See* 1981 U.S.-U.K. Tax Treaty, article 4(b)(2).
88. 8 U.S.C. § 1101(a)(33) (1976).

> promptly accomplished is a transient; but, if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end, the alien makes his home temporarily in the United States, he becomes a resident, although it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this Section, in the absence of exceptional circumstances.[89]

While this elaborate definition provides examples of the various facts which can constitute residence for tax purposes, it contains numerous possibilities for interpretation of the facts of any given situation. As one judge commented, "[r]esidence . . . has an evasive way about it, with as many colors as Joseph's coat".[90]

In contrast with the immigration law definition,[91] which expressly excludes intent as a factor in determining residence, the intention of the foreign entertainer with regard to the length and purpose of his stay in the United States is a critical factor in determining whether he is a resident for tax purposes. The IRS has provided some guidelines, as to intent, in the form of certain presumptions which are set forth in the Regulations and Revenue Rulings. For example, there is an initial general presumption that any United States citizen is a non-resident for tax purposes.[92] This "fact of alienage" presumption of non-residence can be overcome with relative ease and for practical purposes should not generally be relied upon.

The "fact of alienage" presumption may be rebutted by evidence of a definite intention to acquire United States residency or citizenship,[93] or of filing a Declaration of Residency with the IRS on Form 1078.[94] However, filing this Declaration will not be conclusive if there are other factors, as described below, which are inconsistent with the fact of residence. Furthermore, the IRS has indicated that they will not rule on whether an alien is a resident or not if such determination is dependent on factual representations which cannot be confirmed until the year-

89. Treas. Reg. § 1.871-2(b) (1982).
90. Weibe v. U.S., 244 F.2d 158 (9th Cir. 1957).
91. 8 U.S.C. § 1101(a)(33) (1976).
92. *See* Treas. Reg. § 1.871-4(b) (1982).
93. *See* Treas. Reg. § 1.871-4(c)(i) (1982).
94. *See* Treas. Reg. § 1.871-4(c)(ii) (1982).

end.[95]

There is a stronger presumption of residence for tax purposes if an alien has been physically present in the United States for a period of at least one year. The one year presumption is a good rule of thumb, but is by no means conclusive.[96] The one year presumption may be rebutted if it can be established, by reference to the intent of the individual or other facts, whether or not there is a specific purpose or stay which can be accomplished in a definite period of time.[97] This can generally be established by foreign entertainers if their presence in the United States is related to specific performances being given in accordance with a prearranged schedule. For example, in *Ingram v. Bowers*,[98] the Opera Star Caruso spent regular periods of six months a year in the United States for the purposes of operatic and concert singing engagements and was held to be a non-resident.

In many cases, however, even a relatively short period of stay in the United States will be sufficient to establish residence when an entertainer has purchased a residence or established other links in the local community. For example, in *United States v. Wilson*,[99] a Canadian musician who owned real estate in California, who possessed a California driver's license and listed his dwellings in California as his "residence," and who maintained bank accounts, safe deposit boxes, and owned automobiles in the United States was found to have rebutted the presumption of non-residence. Finally, if a foreign entertainer stays in the United States for an indefinite period, he will probably be regarded as a resident for tax purposes.[100]

B. Visa Status and Tax Status

There have been numerous cases and IRS rulings which expressly relate the tax treatment of aliens to visa classification. As was discussed earler,[101] the selection of a visa will not of

95. *See* Rev. Rul. 80-38, 1980-2 C.B. 771.

96. *See* Rev. Rul. 69-611, 1969-2 C.B. 150.

97. *Id.*

98. Ingram v. Bowers, 47 F.2d 925 (S.D.N.Y. 1931), *aff'd*, 57 F.2d 65, 3 T.C. 195 (2d Cir. 1932).

99. United States v. Wilson, 78 CA-9.

100. "If he lives in the United States and has no definite intentions as to his stay, he is a resident." Walter J. Baer, 6 T.C. 1195 (1946).

101. *See supra* Section III(A).

itself determine residence or non-residence for tax purposes,[102] but will be a persuasive factor in evidence.[103]

An entertainer entering the United States on either a B-1 or B-2 Visitor Visa would generally be regarded as a non-resident for tax purposes because by definition the stay is for a limited period of time. These visitor visas are usually issued for one to six months but may be extended beyond that time. If an entertainer stayed for a period in excess of the initial visa period, under a legal extension, he might in some cases be regarded as resident.[104] On the other hand, in one case an author who was in the United States for almost 3 years on an extended visitor visa was held to be non-resident.[105]

Many foreign entertainers will be present in the United States on a H-1 visa, as persons of "distinguished merit and ability".[106] By definition, the H-1 visa is issued as a non-immigrant visa for a limited period, and again the general rule would be to regard the entertainer as non-resident for tax purposes. Although there appear to be no specific Revenue Rulings relating to entertainers holding H-1 visas, the IRS practice with regard to trainees on H-3 Visas is to determine residence by reference to length of stay. For example, for income tax and witholding tax purposes, an individual admitted for training lasting two years would generally qualify as a resident alien, whereas a trainee admitted for training lasting eight months would generally qualify as a non-resident alien. Therefore, it would seem, as a general rule, entertainers who are admitted on non-immigrant visas for initial periods of one year or less for purposes of performing specific temporary services, will qualify as non-resident aliens for tax purposes.[107] If an entertainer on a non-immigrant visa remains in the United States for longer than one year, however, he could be treated as a resident alien from the date of initial entry into the United States.[108]

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102. "The possession of an immigrant visa by an alien, upon his initial entrance into the United States, is not conclusive of his classification as a resident of this country." Court J. Beisigner, 27 T.C.M. (CCH) 725 (1968).

103. *See* Angel De Lauzirika, 40 T.C.M. (CCH) 181 (1971).

104. *See* Patino v. Commissioner, 186 F.2d 962 (4th Cir. 1950).

105. *See* Molnar v. Commissioner, 4 T.C.M. (CCH) 951, *aff'd*, 156 F.2d 924 (2d Cir. 1946).

106. *See supra* IB.

107. *See* Ingram v. Bowers, 47 F.2d at 926.

108. *See* John H. Chapman, 9 T.C. 619 (1947).

The Internal Revenue Code regulations provide that a foreign entertainer who has an alien registration card (green card) will generally be considered to be a resident for tax purposes.[109] If the alien enters the United States on a non-immigrant visa, his stay in the United States is limited by a definite period pursuant to the immigration laws, and therefore he would initially be considered a non-resident for tax purposes "in the absence of exceptional circumstances".[110]

In *Hechavarria v. United States*,[111] a taxpayer attempted to argue that his declaration of intent to become a United States citizen, made for immigration purposes, should not be taken as conclusive for tax purposes. The court acknowledged that the Internal Revenue laws and the immigration statutes "were complementary and not independent" but concluded that aliens may be considered as resident for immigration purposes and non-resident for income tax purposes. However, the court ruled that where there was a pending immigration application, the individual could not obtain the benefits of United States citizenship without paying the price of being subject to United States tax laws.[112]

As a practical matter, agents of both the INS and the IRS have from time to time tried to enforce these general principles as a matter of law by requiring aliens in possession of green cards to pay tax as though they were residents. This issue was taken to the Supreme Court in the case of *Saxbe v. Bustos*.[113] The Court found that daily or seasonal commuters who did not live in the United States, but who were entitled to green cards, and who were within the meaning of the immigration laws "immigrants actually admitted for permanent residence", would not necessarily be subject to United States taxes as residents. This case was followed by a Revenue Ruling issued by the IRS which held that: "classifying commuter aliens as immigrants for immigration purposes does not establish their status for Federal income tax purposes."[114] The IRS has also stated that

109. *See* I.R.S. Publication 519, *U.S. Tax Guide for Aliens (1978)*. It should be noted that both the IRS and the INS regard the filing of a nonresident income tax return (Form 1049NR), by the holder of a green card as inconsistent with permanent resident status for immigration purposes.

110. *See* Treas. Reg. § 1.871-2(b) (1964).

111. Hechavarria v. U.S., 374 F. Supp. 128 (S.D. Ga. 1974).

112. *Id.*

113. Saxbe v. Bustos, 419 U.S. 65 (1974).

114. Rev. Rul. 76-82, 1976-1 C.B. 92.

if "in spite of a visa, the nature of an alien's stay resembles that of a non-resident,"[115] and that conversely, "notwithstanding the fact an alien was admitted on a temporary visa, if the alien's stay in the United States resembles that of a resident alien the alien is a resident alien for federal income tax purposes."[116]

Saxbe v. Bustos, and Revenue Ruling 76-82[117] dealt expressly with commuters from Mexico and Canada. It is not clear whether the IRS's position would be the same for foreign entertainers who, for example, "commute" between other countries and the United States and have "residences" in both countries.

C. Other Factors Determining Tax Residence of Entertainers

The following general principles derived from case law and IRS rulings are material in determining whether an entertainer is to be classified as a resident or non-resident for tax purposes:

(a) the amount of actual time spent in the United States;[118]

(b) whether the family of the entertainer accompanies him, the amount of time they spend in the United States, and whether the entertainer's children attend school in the United States;[119]

(c) whether a "home" is owned in the United States;[120]

(d) whether the entertainer has obtained a driver's license;[121]

(e) the extent of involvement in local community activities, for example memberships of clubs, societies, religious groups, etc.;[122]

(f) the country which is stated as a residence on any credit or other application;[123]

(g) whether the entertainer has a non-immigrant visa or a

115. IRS Publication 519, *supra* note 109.

116. Rev. Rul. 76-82, *supra* note 114.

117. *Id.*

118. Rev. Rul. 69-611, *supra* note 96.

119. *See* William E. Adams, 46 T.C. 352 (1966), *acq.*, 1967-2 C.B. 659; Joyce De Begassiere, 31 T.C. 1031, *aff'd per curiam*, 274 F.2d 709 (5th Cir. 1959).

120. *See* John H. Chapman v. Commissioner, 9 T.C. 619 (1947); *but see* Adams v. Commissioner, 460 T.C. 352 (1966).

121. United States v. Wilson, 78 CA-9.

122. *See* Kajetan Rynowiecki, 27 T.C.M. (CCH) 151 (1968).

123. 374 F. Supp. at 131.

permanent visa;[124]

(h) the extent of business investments in the United States;[125]

(i) whether taxes are paid in country of citizenship or the United States.[126]

D. Planning for Entertainer to Avoid United States Tax Residence

The entertainer who wishes to avoid being a resident for United States tax purposes should take note of the general principles listed above, and take the following precautions to establish that he is a non-resident. The entertainer should enter on a non-immigrant visa with a maximum one year period. He should not continue to stay, or obtain an extension of the visa after he is present in the United States for 11 months without returning to the place of residence. If the entertainer owns a home in the United States, he should treat it as a vacation home and it should not be listed as his place of residence. He should avoid joining local social community clubs or other organizations. He should avoid traveling with his family or taking too many possessions with him. All application forms requiring an address should specify any United States address as "temporary".

The entertainer should use international credit cards, issued from the country of citizenship. He should travel on an international driver's license and should rent cars, and not own a car in the United States. Finally he should maintain bank accounts overseas, and any bank account in the United States should be closed as soon as he leaves the country. It can thus be seen that the determination of residence for tax purposes is a critical one.

E. Taxation of Non-resident and Resident Entertainers

The Internal Revenue Code and Regulations which set forth the general United States tax laws do not contain specific provisions relating to foreign entertainers or athletes as a group. Therefore in the absence of specific tax treaty provisions the general law relating to taxation of non-resident aliens will apply. Because it is beyond the scope of this article to provide a detailed analysis of the complex rules relating to taxation of

124. *See* Park, 79 T.C. No. 27.
125. *Id.*
126. *Id.*

non-resident aliens, this section is an attempt to summarize some of the rules which are likely to affect a foreign entertainer who is a non-resident for tax purposes.

A foreign entertainer who performs in the United States will be considered to be engaged in a trade or business within the United States and will be subject to federal income tax at applicable progressive rates on taxable income which is "effectively connected with the conduct of a trade or business within the United States."[127] The concept of "effectively connected income" would include compensation for performances rendered in the United States by an entertainer whether in the capacity of an employee or as an independent contractor.

Foreign entertainers may also be subject to taxation on royalties earned from performing in the United States or from the use of the United States copyrights.[128] Careful determination should be made as to whether payments are for services or for royalties. For example, income from a record which was made by a non-resident singer in the United States was held to be royalties from the United States sources subject to United States taxation.[129] Royalty income which is not effectively connected with a United States trade or business and which is paid to a non-resident entertainer will be subject to 30% withholding on a gross basis without deductions.[130] Income from performances in the United States will be deemed effectively connected with a United States trade or business and will be subject to graduated rates of taxation on a net basis.[131]

If it is established that a foreign entertainer is a resident alien for United States tax purposes then he will be subject to United States taxation on world-wide income from all sources in exactly the same manner as a United States citizen.[132] A non resident will generally only be subject to United States taxation on United States source income.

F. Withholding Taxes on Foreign Entertainers

The foreign entertainer will most likely come into contact with the IRS with regard to the method and amount of with-

127. I.R.C. § 871(b)(1) (1976).
128. I.R.C. § 861(a)(4) (1976).
129. Ingram v. Bowers, 47 F.2d at 926.
130. I.R.C. § 871(a)(1)(A) (1976).
131. I.R.C. § 861(a)(4) (1976).
132. *See* I.R.C. § 61 (1976).

holding taxes on amounts earned for services performed in the United States. Therefore, the entertainer's agent, manager, promoter, or other person having control[133] over funds paid to the entertainer (who may be determined to be a withholding agent) should become familiar with the IRS provisions contained in sections 3401, 3402 and 1441, which relate to the withholding of wages. In addition, the withholding agent can be held personally liable for the amount of tax which should be withheld,[134] and because of the special attention which the IRS gives to foreign entertainers, promoters are well advised to insure that appropriate withholding arrangements are made.

Internal Revenue Code provisions subject entertainers to withholding of tax in two different ways:

1. *Employees*

If the foreign entertainer is an employee and receives renumeration which constitutes wages within the meaning of the IRS Code,[135] then withholding on wages will be made at graduated rates as for American employees.[136] Monies will be withheld with respect to all services performed by the entertainer in the United States by an employer regardless of whether the employer is a United States person or entity.[137] A non-resident entertainer will not, however, be subject to United States taxation or withholding on remuneration received for services performed outside the United States.[138]

There is a limited statutory exemption from withholding of tax under the Code if the entertainer satisfies three requirements: (i) the compensation does not exceed $3,000; (ii) the services are performed for a non-resident person or entity not otherwise doing business in the United States; and (iii) the entertainer must be physically present in the United States for less than 90 days.[139] If any one of these requirements are not

133. It includes every person who pays an item of income specified in regulation 1.1441-2 to a nonresident alien individual, foreign partnership or foreign corporation, and includes "all persons, in whatever capacity, acting (including lessees and mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States) having control, receipt, custody, disposal or payment . . . ." I.R.C. § 1441(a) (1982).

134. I.R.C. § 1461 (1976).

135. I.R.C. § 3401(a) (1976).

136. I.R.C. § 3402 (1976).

137. *See* Rev. Rul. 76-19, 1976-1 C.B. 441.

138. Treas. Regs. § 31-3401(a)(6)-1A(b) (1982).

139. I.R.C. § 861(a)(3) (1976).

strictly adhered to; then the entire amount received is subject to withholding tax.

2. *Self-employed/Independent Contractors*

If an employer/employee relationship does not exist, then the entertainer may be regarded as an "independent contractor" and withholding of tax will be made pursuant to Code section 1441. This section imposes tax at 30% of compensation received by a nonresident alien for performance of personal services. Any payments to a foreign entertainer for services performed in the United States as an independent contractor are not "wages" within the meaning of IRS Code section 3402 and are subject to the 30% withholding under Code section 1441.[140]

The question of whether services are performed as an employee or as an independent contractor will be a question of fact.[141] For example, in some cases, members of a band have been held to be employees of the band leader,[142] and in others each performer has been held to be an independent contractor.[143]

There may be an exemption or reduced rate of withholding of tax if an entertainer is entitled to the benefits under certain tax treaties with the United States. The Regulations under section 1441 provide an express exemption from withholding in cases[144] where an entertainer is a resident of a country with a tax treaty with the United States, which would exclude the income from United States taxation. Notwithstanding these regulations, the IRS has taken the position, particularly with foreign entertainers, that withholding must be made even where a treaty or other exemption may be applicable unless a specific ruling from the IRS is obtained.[145]

The Service has developed an administrative policy regarding the enforcement of withholding on receipts from events and promotions in which a foreign entertainer participates.

140. *See* Rev. Rul. 503, 1975-2 C.B. 352.

141. Treas. Reg. § 31.3401(c)-1(b) (1982).

142. Bartels v. Birmingham, 332 U.S. 126 (1947).

143. *See, e.g.*, Radio City Music Hall Corp. v. ULS., 135 F.2d 715 (2d Cir. 1943); Rev. Rul. 68-2128.

144. Treas. Reg. § 1.1441-4(b)(iv) (1982).

145. *See* Rev. Rul. 543, 1970-2 C.B. 173.

This policy is in effect even where there may be exemption for withholding under a tax treaty. According to the Service:

> Withholding at the full 30% rate is required for payments that represent gate receipts (or television or other receipts) from rock music festivals, boxing promotions, and other entertainment or sporting events made to a non-resident alien or foreign corporation unless the withholding agent has been specifically advised otherwise by letter from the Internal Revenue Service. One reason for this is that the partial or complete exemption provided by certain tax treaties usually is based upon factors not generally determinable until after the close of a tax year. Also, when an alien's services are furnished by a foreign corporation, the qualification for tax treaty benefits may not be readily ascertainable because of the need to resolve other issues such as: the existence of an agency relationship rather than a bona fide employer/employee relationship; the status of a foreign corporation as engaged or not engaged in trade or business in the United States; and the possibility that business arrangements may constitute an assignment of income.[146]

Accordingly, withholding under section 1441, should be made on the gross amount of receipts or compensation for the performance of personal services, at the 30% rate imposed by Code section 871(a)(i), notwithstanding that this income might otherwise qualify as "effectively connected income" under Code section 864(c) and be taxable on a net basis at graduated rates.[147]

If payments for services performed by the entertainer are rendered by a foreign corporation or a foreign partnership, there may be exemption from withholding at source if the income qualifies as effectively connected with the conduct of a trade or business in the United States.[148] In order to claim exemption from withholding the foreign corporation or partnership should file form 4224 in duplicate with the withholding agent prior to payment of any income.[149] If, however, the compensation is paid to a foreign corporation which is a foreign personal holding company or personal holding company,[150] any personal service contract income will still be subject to the 30% withholding.[151]

146. *See* IRS PUBLICATION 515 (1979).
147. Treas. Reg. § 1.1441-4(a)(i) (1982).
148. Treas. Reg. § 1.1441-4(a)(1) (1982).
149. Treas. Reg. § 1.1441-4(a)(2) (1982).
150. *See* section 543(a)(7).
151. *See* Treas. Reg. 1441-4(a)(1) (1982); Rev. Rul. 331, 1974-2 C.B. 282.

The additional amount of tax which must be withheld can cause cash flow problems to some entertainers who may have to wait until after the end of the tax year to recover amounts of tax overpaid which have been over-withheld. A promoter may therefore sometimes enter into an arrangement with the Service prior to commencement of a tour whereby the foreign entertainer will enter into a centralized withholding agreement with the government to provide for taxes. Such an arrangement may permit periodic disbursements to cover expenses before the final deposit of tax is paid to the government.

G. Tax Treaty Provisions Relating to Foreign Entertainers

Some of the tax treaties in force between the United States and other countries contain specific provisions relating to the taxation of artists and athletes. These treaties, in effect, discriminate against entertainers as a group by providing for their separate tax treatment. For example, the first tax treaty between the United States and the United Kingdom contained a provision which distinguished entertainers from businessmen and members of other professions by excluding them from the definition of "commercial traveler".[152] Although this provision was subsequently found to be discriminatory and was deleted, subsequent tax treaties with many countries have continued to make the distinction and provide for special treatment of foreign entertainers.

The 1977 OECD Model Income Tax Convention, the 1977 United States Model Income Tax Treaty, and the 1981 proposed United States Model Income Tax Treaty all contain similar provisions relating to taxation of foreign entertainers.[153] The provisions of the model conventions relating to artists and athletes are reflected in the latest United States-United Kingdom Income Tax Treaty ratified in 1981. Article 17(1) of this treaty following the United States Model Treaty provides that services performed by artists or athletes are to be taxed in the country where the services are performed.[154] On the other

152. Income tax convention, United States-United Kingdom, article XI(3), April 16, 1945.

153. *See, e.g.*, article 17 of the proposed 1981 Income Tax Treaty on "Artists and Athletes."

154. *See* 1981 U.S.-U.K. Tax Treaty article 17(1):

> Notwithstanding the provisions of Articles 14 (Independent Personal Services) and 15 (Dependent Personal Services) income derived by entertainers, such as theatre, motion picture, radio or television artists, and musicians, and

hand, members of other professions or business people may be taxed in their country of residence subject to certain conditions as set forth in other provisions of the treaty.[155]

Thus, for example, an English actor employed by an English company who is required to film on location in the United States for a seven-day period may be subject to United States taxation under article 17(1) of the Treaty on the amount earned, or expenses paid if either amount exceeds $15,000. The $15,000 limitation in the United States-United Kingdom treaty applies to total gross receipts in a tax year and not to one specific engagement. Any amounts reimbursed or paid by third parties on behalf of the entertainer for travel, meals and lodgings, and other expenses will be included in determining the $15,000 limitation. By contrast, the same company could employ a film technician who, under article 15 of the Treaty would remain subject to United Kingdom taxation and would not be subject to United States taxation provided he remained in the United States for less than 183 days in the tax year.

Article 17(2) of the 1981 United States-United Kingdom Tax Treaty, following the Model Income Tax Treaty, is specifically aimed at limiting the tax benefits to entertainers who provide services through "loan-out corporations."[156] The IRS is very sensitive to the issue of entertainers using so-called loan out arrangements and there is a history of the Service attacking situations where tax treaties have been utilized to obtain favorable tax treatment for loan-out corporations controlled by

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by athletes, from their personal activities as such may be taxed in the Contracting State in which these activities are exercised, except where the amount of the gross receipts derived by an entertainer or athlete, including expenses reimbursed to him or borne on his behalf, from such activities do not exceed $15,000 United States dollars or its equivalent in pounds sterling in the tax year concerned.

155. *Id.* at articles 14, 15.

156. *Id.* at article 17(2):

Where income in respect of personal activities as such of an entertainer or athlete accrues not to that entertainer or athlete himself but to another person, that income may, notwithstanding the provisions of Articles 7 (Business Profits), 14 (Independent Personal Services), and 15, (Dependent Personal Services), be taxed in the contracting State in which the activities of the entertainer or athlete are exercised. For the purposes of the preceding sentence, income of an entertainer or athlete shall be deemed not to accrue to another person if it is established that neither the entertainer or athlete, nor persons related thereto, participate directly or indirectly in the profits of such other person in any manner, including the receipt of deferred remuneration, bonuses, fees, dividends, partnership distributions or other distributions.

entertainers or sports figures. For example, two Revenue Rulings were published in 1974 to provide strict guidelines for the use of loan-out and double loan out corporations which were being utilized by entertainers under an earlier tax treaty between the United States and the United Kingdom in force at that time.[157] The IRS held in these rulings that where the relationship between the United States person and the entertainer, or the entertainer and a foreign corporation is not readily ascertainable, the United States person (promoter) should withhold from the amount paid for services rendered at a rate of 30%. The IRS also took the position that where a United Kingdom entertainer or a United States promoter had control over the details of the entertainer's work, there was no valid employer/employee relationship and the personal service income exemption under that treaty would not be available to the entertainer.

In one case where the Swedish boxer Ingmar Johannson formed a Swiss corporation for the express purpose of receiving fees from a world heavyweight title fight taking place in the United States, the Tax Court disregarded the provisions of the United States-Swiss Tax Treaty which could have sheltered this income and found the boxer's employment with the corporation to be a sham.[158]

While it is still possible, with careful planning, for foreign entertainers and athletes to utilize loan-out corporations pursuant to provisions of certain tax treaties so as to reduce or avoid United States taxation, the Service continues to attack these arrangements. Furthermore, it is likely that new treaties which are being negotiated will follow the strict provisions contained in the model conventions and the new United States-United Kingdom Tax Treaty.[159]

V

IRS Reporting Requirements for Entertainers

A. Sailing Permit

Any alien, whether resident or non-resident, is generally required to obtain a certificate, known as a "sailing permit", stating that he has complied with all United States income tax

157. *See* Rev. Rul. 330, 1974-2 C.B. 278; Rev. Rul. 331, 1974-2 C.B. 282.
158. Johansson v. U.S., 336 F.2d 809 (5th Cir. 1964).
159. 1981 U.S.-U.K. Tax Treaty, *supra* note 154.

obligations before leaving the United States. This requirement would generally apply to all foreign entertainers unless they were B-1 or B-2 visitors whose stay did not exceed ninety days in any taxable year. It would also apply to an entertainer on an H-1 visa whose income might be exempt by virtue of an income tax treaty.

If a departing entertainer does not have a certificate of compliance he may be subject to examination by an internal revenue agent and required to complete any delinquent tax returns together with Form 1040C or 2063 and pay any required tax. As a practical matter, this requirement is difficult to enforce. It should be noted, however, that all applicable civil penalties under the Code could be utilized to enforce compliance.[160]

B. Filing a Nonresident Tax Return

A foreign entertainer classifiable as a nonresident alien is required to file Form 1040NR on the 15th day of the sixth month following the close of the taxable year (this will be June 15th for taxpayers filing on a calendar year), unless his compensation constitutes wages subject to withholding. In this case, Forms 1040NR must be filed on or before the 15th day of the fourth month following the close of the tax year (April 15th for taxpayers on a calendar year basis).[161]

C. Declaration of Estimated Tax

A foreign entertainer could be required to file a declaration of estimated tax using Form 1040ES.[162] This declaration must be filed if the gross income of the entertainer is expected to exceed:

(1) $20,000, if single;

(2) $5,000, if married; or

(3) $500 from sources other than wages subject to withholding unless income tax and self employment tax estimated to be due can reasonably be expected to exceed estimated withholding.[163]

An entertainer whose gross income is derived only from performances or services for an employer is not required to file the declaration of estimated tax.

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160. *See, e.g.*, I.R.C. § 6651(a)(2)(3); § 6653(a)(b) (1976).

161. *See* I.R.C. § 6072(c) (1976); Treas. Regs. § 1.6072-1(c) (1982).

162. *See* I.R.C. § 6015(d) (1976); Treas. Regs. § 1.6015(d)-1 (1982).

163. *See* I.R.C. § 6015(c) (1976); Treas. Regs. § 1.6015(c)-1 (1982).

VI
Conclusion

Foreign entertainers and athletes as a group, are closely scrutinized by both the immigration and tax authorities. The administrative practices of both the INS and the IRS do not always follow procedures applicable to other professions or businesses, and certain provisions of the immigration law and the tax law found in tax treaties continue to discriminate against entertainers as a group. Accordingly, careful planning is necessary to ensure that the foreign entertainer complies strictly with all immigration, tax and legal requirements in order to avoid denial of benefits which might otherwise be available.